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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Appellant,

v.

RICHARD FLORES VALLE,

Defendant and Respondent.

F062083

(Super. Ct. No. 10CM7580)

OPINION

APPEAL from an order of the Superior Court of Kings County. Robert S. Burns, Judge.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna, Angelo S. Edralin and Sarah J. Jacobs, Deputy Attorneys General, for Plaintiff and Appellant.

Nuttall Coleman & Wilson, Roger T. Nuttall and Roger S. Bonakdar for Defendant and Respondent.

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INTRODUCTION

This is an appeal by the Attorney General from an order recusing the office of the District Attorney of Kings County (the district attorney's office) from participating in the prosecution of sexual assault charges it filed against respondent Richard Flores Valle, who is an elected member of the Board of Supervisors of Kings County (Board of Supervisors). The Attorney General argues the recusal order constitutes an abuse of judicial discretion.¹ We are not persuaded and will affirm.

FACTS

On December 7, 2010, the Kings County District Attorney filed a five-count complaint charging Valle with sexually assaulting two women. (Pen. Code, §§ 288a, subds. (f) & (i), 289, subds. (d) & (e), 261, subd. (a)(3).)²

On January 28, 2011, Valle filed a motion to recuse the district attorney's office (the recusal motion). Valle asserted that the Board of Supervisors "has direct control of the budget and manpower of" the district attorney's office and the functions of the Board of Supervisors include "appropriation and allocation of funds" to the district attorney's office. Valle argued that as an elected and sitting member of the Board of Supervisors he performs discretionary functions that may affect the district attorney's office. Therefore, "the question of neutrality and even handed treatment is called into question" and there exists an "actual and realistic conflict" that renders it unlikely that he "will be afforded fair and impartial consideration and treatment during all portions of the proceedings."

The Attorney General opposed the recusal motion. It contended any possible conflict was speculative, there was no proof Valle would not receive a fair trial, and

¹ An appeal may be taken from an order of recusal. (Pen. Code, § 1424, subd. (a)(2); *People v. Jenan* (2006) 140 Cal.App.4th 782, 784 (*Jenan*).)

² All further statutory references are to the Penal Code unless otherwise indicated.

recusal of the entire district attorney's office was unwarranted. It proffered a brief declaration signed by Ty Ford, the deputy district attorney assigned to handle Valle's case. Ford averred, "I have and will continue to exercise my prosecutorial discretionary function in an even-handed manner in this case."

A hearing on the recusal motion was held on February 8, 2011. Larry Crouch spoke on behalf of the district attorney's office. At a subsequent hearing, the court described Crouch as "the chief trial attorney for the county and Mr. Ford's supervisor and the member of the upper echelon in the D.A.'s Office." Crouch stated, "[O]n behalf of the District Attorney's office, we believe that that relationship does cause us problems and we believe the motion's well put."³ Crouch explained that Valle "has power over our office, if we take an action that is perceived to be favorable to him it appears we're intending to [curry] favor. If we take a position that appears to be contrary to his interests, it will appear that we're trying to punish him for perceived wrongs that he has done in our office." Crouch continued, "It puts us in a position that makes it very difficult for us to exercise [discretion]." The court asked, "In other words, because of ... [Valle's] position on the Board any discretionary gesture of leniency would be seen to be -- would be difficult for you to achieve because it would be seen to be in favor for his position as opposed to analysis of the case, the facts of the particular case before you?" Crouch replied, "We believe that perception is out there, yes. Potential for that perception. We take it seriously." The court characterized Crouch's comments as meaning Valle would be unable to "get a fair trial" due to the "inability to negotiate [the case] in a more lenient fashion." The hearing was continued after Valle's counsel informed the court he had been advised of two new factual circumstances.

³ Ford did not speak at this hearing or at the subsequent hearing held on March 14, 2011.

On March 1, 2011, Valle filed a supplemental brief and a declaration authored by defense counsel, Roger Nuttall. Nuttall declared “at various times” during Mr. Valle’s tenure on the Board of Supervisors he “made certain decisions which, at times, were not agreeable with certain individuals ... including some persons affiliated with the [district attorney’s office].” Nuttall continued, “I am informed that it is ‘no secret’ that some individuals disagreed with his decisions; in some cases, rather strongly.” Also, Nuttall averred that recently one of the alleged victims (hereafter victim No. 1) was hired by the Kings County Victim-Witness Program (CVWAP) to work at the “victim witness advocate center in Hanford.”⁴ In Nuttall’s experience, entities similar to CVWAP “are an integral part of and directly interact and participate in prosecution’s development of a case.” This participation “generally includes contact with witnesses and the assemblage of evidence and testimony.” In supplemental briefing, Valle argued that the alleged victim’s new employment tends to show the district attorney’s office has taken a position on her “veracity and character to an inappropriate level” and her work creates a risk that she “will exercise control and influence the exercise of prosecutorial discretion in this case.”

The Attorney General filed a supplemental brief arguing Valle had not produced verification of victim No. 1’s employment by the probation department. Further, there was no proof she would have access to the district attorney’s file in this case or would exert any improper influence on prosecutorial discretion.

The court reconvened on March 14, 2011. After argument, the court ruled the two-part standard applicable to recusal motions was met. First, it found “Mr. Crouch’s

⁴ Nuttall averred that he could prove the victim’s employment with CVWAP by statements the victim made via social media outlets. He did not file a copy of these publications to protect the victim’s privacy but “would ... be glad to produce them to the court and counsel *in camera*.”

statement that they would find it difficult to exercise their discretion because of Mr. Valle's status as a board member," was sufficient to give "an appearance that there may be a conflict." Then it determined that this conflict was severe enough to make "fair and impartial treatment of the defendant unlikely." It explained that the district attorney's difficulty in exercising prosecutorial discretion would affect plea bargaining and sentencing recommendations "because of the perception that if it was lenient, they would try to benefit Mr. Valle because of his position as a board member as ... well as a statement that if they would to take a firmer stance with Mr. Valle, even though it may be warranted by the case, that may be perceived as punishment by Mr. Valle for his position on the board." The court determined it was necessary to recuse the entire district attorney's office because "[t]his is going to be a case, as I see news media out in the audience, they show up regularly, it's going to be gathering attention, which would suggest to me that you are going to have the District Attorney and his top echelon making decisions. I doubt they are going to let Mr. Ford operate with complete autonomy because of the potential for headlines." The court found that it would be "overstepping" its bounds if it were to bar the district attorney, who is an elected official, or the top deputies from making any decisions in this case.

DISCUSSION

I. The Court Applied the Correct Standard.

In *Stark v. Superior Court* (2011) 52 Cal.4th 368, our Supreme Court recently summarized the history of California law surrounding recusal of a district attorney. It explained that *People v. Superior Court (Greer)* (1977) 19 Cal.3d 255 (*Greer*) held that trial courts possess the inherent power to disqualify the district attorney when there exists a conflict of interest "which might prejudice him against the accused and thereby affect, or appear to affect, his ability to impartially perform the discretionary functions of his office." (*Id.* at p. 269, fn. omitted.) In response to the *Greer* decision, the Legislature

enacted section 1424, which “provides that motions to disqualify the district attorney may not be granted ‘unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial.’” (*Stark, supra*, 52 Cal.4th at p. 415.) Section 1424 was interpreted in *People v. Conner* (1983) 34 Cal.3d 141 (*Conner*) and *People v. Eubanks* (1996) 14 Cal.4th 580 (*Eubanks*). The *Conner* decision set forth a two-part test for determining whether recusal is required under section 1424: “(1) is there a conflict of interest and (2) is the conflict so severe as to disqualify the district attorney from acting?” (*People v. Choi* (2000) 80 Cal.App.4th 476, 481 (*Choi*), citing *Conner, supra*, 34 Cal.3d at p. 148 and *Eubanks, supra*, 14 Cal.4th at p. 594.) The *Eubanks* decision explained, “[W]hether the prosecutor’s conflict is characterized as actual or only apparent, the potential for prejudice to the defendant—the likelihood that the defendant will not receive a fair trial—must be real, not merely apparent, and must rise to the level of a *likelihood* of unfairness. Thus section 1424, unlike the *Greer* standard, does not allow disqualification merely because the district attorney’s further participation in the prosecution would be unseemly, would *appear* improper, or would tend to reduce public confidence in the impartiality and integrity of the criminal justice system.’ [Citation.]” (*Stark, supra*, 52 Cal.4th at p. 415, quoting *Eubanks, supra*, 14 Cal.4th at p. 592.)

The Attorney General argues the court erroneously applied the *Greer* standard. We are not persuaded. The record affirmatively demonstrates that the trial court had an excellent grasp of the applicable legal principles and applied the correct standard. In the midst of a colloquy between Crouch and the court that occurred during the February 8th hearing, the court stated that Crouch seemed to be advocating the “old *Greer* standard, that is not the current 1424 standard” (*italics added*). And at the outset of the March 14th hearing the trial court stated it “went back and revisited Penal Code Section 1424 as well as some of the State Supreme Court decisions that have analyzed that section,” including

Conner, supra, 34 Cal.3d 141 and *Eubanks, supra*, 14 Cal.4th 580. During the court’s explanation of its ruling, it stated that section 1424 created a “two prong test” that narrowed the *Greer* standard by requiring proof that the conflict makes “fair and impartial treatment of the defendant unlikely.” Thus, the court did not apply the *Greer* standard when ruling on the recusal motion.⁵

The Attorney General also argues that the trial court erred by holding that an apparent conflict of interest is adequate to satisfy the first prong of the current standard. This point has been resolved adverse to the Attorney General’s current position.⁶ *Conner, supra*, 34 Cal.3d 141, explained: “In our view a ‘conflict,’ within the meaning of section 1424, exists whenever the circumstances of a case evidence a reasonable possibility that the DA’s office may not exercise its discretionary function in an evenhanded manner. Thus, there is no need to determine whether a conflict is ‘actual,’ or only gives an ‘appearance’ of conflict.” (*Id.* at p. 148; see also, e.g., *Jenan, supra*, 140 Cal.App.4th at pp. 791-792.) An appearance of conflict is adequate to satisfy the first prong because it “could signal the existence of an ‘actual’ conflict which, although prejudicial to the defendant, might be extremely difficult to prove.” (*Conner, supra*, 34

⁵ Valle’s position that “the court applied both the standards in *Greer* and in section 1424” is not supported by the record.

⁶ This argument constitutes a direct reversal of the Attorney General’s original position on this issue. During the March 14th hearing, the Attorney General expressly acknowledged that the appearance of a conflict of interest was sufficient to satisfy the first prong of the current standard. Since Assistant Attorney General Sarah Jacobs litigated this matter in the superior court and on appeal, she is presumably aware of the change in position. Yet, because we have resolved the point adverse to the Attorney General’s current position, it is not necessary to address Valle’s contention that the Attorney General should be collaterally stopped from adopting a new position on this issue.

Cal.3d at p. 147.) Therefore, we hold that the trial court's ruling on the recusal motion was based on the correct legal standard.

II. Challenges to the Form and Admissibility of Valle's Evidence Were Forfeited.

Next, the Attorney General argues the trial court erred by admitting the evidence Valle proffered in support of the recusal motion (Crouch's statements at the February 8th hearing and Nuttall's declaration) because it was not submitted in compliance with section 1424, subdivision (a). In relevant part, this section provides that the notice of motion "shall be supported by affidavits of witnesses who are competent to testify to the facts set forth in the affidavit." (§ 1424, subd. (a)(1).) We agree with Valle that the Attorney General forfeited this claim by failing to object on this ground below.

"No procedural principle is more familiar to [the United States Supreme Court] than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.' [Citation.]" (*United States v. Olano* (1993) 507 U.S. 725, 731.) This is known as the contemporaneous objection rule and it is codified in California state law at Evidence Code section 353, subdivision (a), which provides that a judgment will not be reversed on the ground that evidence has been erroneously admitted unless "there appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so *stated as to make clear the specific ground of the objection or motion*' [Citation.] Specificity is required both to enable the court to make an informed ruling on the motion or objection and to enable the party proffering the evidence to cure the defect in the evidence." (*People v. Mattson* (1990) 50 Cal.3d 826, 853-854.)

During the proceedings below, the Attorney General did not interpose any objections to the form or admissibility of the evidence Valle proffered in support of the recusal motion. It did not object on the ground that Valle's evidence did not comply with

section 1424, subdivision (a)(1). Also, the Attorney General did not contend that Crouch's statements should not be considered because Crouch was not sworn as a witness or argue that Nuttall's averments concerning victim No. 1 should be excluded because he lacked personal knowledge. On the contrary, during the March 14th hearing, the Attorney General argued that the conflict claim was purely speculative and the court asked, "But wouldn't Mr. Crouch's statement in this court be evidence?" The Attorney General replied, "I agree that Mr. Crouch's statement does provide evidence." Having failed to interpose any objections to the form or admissibility of the evidence Valle proffered in support of the recusal motion, the Attorney General forfeited appellate review of claims raised for the first time on appeal. "In failing to raise the issue in the trial court, the People waived ^[7] any objection they may have had to the court's procedure. Having failed to raise the issue in the trial court, they are barred from raising it for the first time on appeal." (*Choi, supra*, 80 Cal.App.4th at p. 480, fn. 3 [procedural due process claim forfeited when People did not object to lack of opportunity for additional briefing after the court admitted new evidence supporting recusal motion].)

III. The Court's Findings of Conflict and Gravity are Supported by Substantial Evidence.

The standard of appellate review is undisputed:

⁷ "... Over the years, cases have used the word [waiver] loosely to describe two related, but distinct, concepts: (1) losing a right by failing to assert it, more precisely called forfeiture; and (2) intentionally relinquishing a known right. '[T]he terms "waiver" and "forfeiture" have long been used interchangeably. The United States Supreme Court recently observed, however: "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.' [Citations.]" [Citation.]' [Citation.]" (*Cowan v. Superior Court* (1996) 14 Cal.4th 367, 371; *People v. Chaney* (2007) 148 Cal.App.4th 772, 777, fn. 2.)

“[A] motion to recuse is directed to the sound discretion of the trial court, and its decision to grant or deny the motion is reviewed only for an abuse of discretion. [Citations.] The abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a trial court’s ruling under review. The trial court’s findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious.” (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-712, fns. omitted.)

The testimony of a single witness is sufficient to prove a disputed fact unless the testimony is inherently improbable or physically impossible. (*People v. Young* (2005) 34 Cal.4th 1149, 1181; *People v. Scott* (1978) 21 Cal.3d 284, 296.) “‘Before a judgment of conviction can be set aside for insufficiency of the evidence to support the trier of fact’s verdict, it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support it.’ [Citation.]” (*People v. Kwok* (1998) 63 Cal.App.4th 1236, 1245.)

The Attorney General argues the trial court’s finding of an appearance of a conflict of interest and its finding that the conflict was severe enough to make “fair and impartial treatment of the defendant unlikely” are not supported by substantial evidence. We are not persuaded.

In our view, the evidence amply supports the court’s findings of both conflict and unlikelihood of fair and impartial treatment. As a sitting member of the Board of Supervisors, Valle votes on budget appropriations to the district attorney’s office. Crouch stated that because of Valle’s elected position, the district attorney’s office would have difficulty exercising discretion in the areas of plea bargaining and sentencing recommendations. Crouch is one of the three top deputies in the district attorney’s office and Ford’s supervisor. The trial court was entitled to give greater weight to Crouch’s statements that it thought the recusal motion was “well put” and that prosecutorial discretion would be impaired in this case, than to Ford’s declaration averring that he

would continue to exercise his discretion in an evenhanded manner. The trier of fact makes credibility determinations and resolves factual disputes. (*People v. Estrella* (1995) 31 Cal.App.4th 716, 724-725.) An appellate court will not substitute its evaluation of a witness's credibility for that of the fact finder. (*People v. Vazquez* (2009) 178 Cal.App.4th 347, 352.) The trial court could reasonably conclude that Crouch possessed a fuller understanding than Ford of the difficulties involved in prosecuting a member of the Board of Supervisors for serious and shocking crimes such as rape on an unconscious victim that will garner a great deal of media attention.

Also, no evidence was presented disputing Nuttall's averment that victim No. 1 was hired by CVWAP. Valle's argument that entities similar to CVWAP "are an integral part of and directly interact and participate in the prosecution's development of a case" is well-taken. Victim No. 1's employment creates a possibility that she could influence the exercise of prosecutorial discretion in this case.

In sum, Valle is one of the few elected officials who control the purse strings of the district attorney's office. He is charged with highly salacious crimes that garner a great deal of public interest and a justifiable sense of horror and disgust. A senior member of the district attorney's office informed the court that it would be very difficult to treat Valle fairly since Valle "has power over our office, if we take an action that is perceived to be favorable to him it appears we're intending to [curry] favor. If we take a position that appears to be contrary to his interests, it will appear that we're trying to punish him for perceived wrongs that he has done in our office." One of the victims has been hired by an entity that participates in the prosecution of cases. These circumstances are sufficient to support the trial court's findings of a conflict and of an unlikelihood that the district attorney's office could treat Valle neutrally and evenhandedly during all portions of the prosecution.

The Attorney General's contention that neither plea bargaining nor sentencing recommendations are essential parts of the trial process is not well-taken. Determining if a negotiated plea should be offered to a defendant and deciding what sentence to recommend are essential components of a prosecutor's role in a criminal case. (See, e.g., *Ganger v. Peyton* (4th Cir. 1967) 379 F.2d 709, 711-712.) In the *Connor* decision, our Supreme Court determined that, "[D]iscretionary powers exercised either before or after trial (e.g., plea bargaining or sentencing recommendations)" are included within the ambit of section 1424 and that recusal is appropriate if the district attorney's exercise of discretion in these areas "consciously or unconsciously, could be adversely affected to a degree rendering it unlikely that defendant would receive a fair trial." (*Conner, supra*, 34 Cal.3d at p. 149; see also *Choi, supra*, 80 Cal.App.4th at p. 483.)

Two cases upheld recusal of the district attorney's office in factual situations that are similar to the one before this court. In *Jenan, supra*, 140 Cal.App.4th 782, we affirmed recusal of the district attorney's office where the two defendants were charged with attempting to dissuade a district attorney's investigator from testifying at a prior criminal proceeding pending against them. We reasoned that where a prosecutor would be required to argue for the credibility of his or her colleagues, both conflict and unfairness is likely. (*Id.* at pp. 792-793.) Similarly, in this case victim No. 1 has been hired by CVWAP and is now, in a limited sense, a colleague of the investigators and prosecutors in the district attorney's office. And in *Lewis v. Superior Court* (1997) 53 Cal.App.4th 1277 (*Lewis*), Lewis was the elector-controller for Orange County. Following the county's bankruptcy, a proceeding was brought to remove him from office for willful misconduct. Recusal of the district attorney's office was affirmed. Among the many factors cited by the appellate court proving the gravity of the conflict was "the petitioner's continuing role as auditor of county departments." (*Lewis, supra*, 53 Cal.App.4th at p. 1286.) As in *Lewis*, Valle remains a sitting member of the Board of

Supervisors and, barring unforeseen circumstances, will continue to make budgetary decisions directly affecting the district attorney's office during prosecution of the charges against him.

For all of these reasons, we hold that the trial court's findings of conflict and likelihood of unfair treatment are supported by substantial evidence. (*Conner, supra*, 34 Cal.3d at p. 149 [court refused to disturb trial court's conclusion that district attorney's discretionary powers at plea bargaining or sentencing "consciously or unconsciously, could be adversely affected to a degree rendering it unlikely that defendant would receive a fair trial"].)

IV. Recusal of the District Attorney's Office Was Not An Abuse of Discretion.

Lastly, the Attorney General argues recusal of the district attorney's office was an abuse of discretion because an ethical wall separating Ford from the district attorney and the rest of his staff would cure the conflict. We are not convinced. The record affirmatively demonstrates that the court considered an ethical wall and decided it would not be an appropriate remedy. It reasoned that in light of participation by Crouch at the hearings on the recusal motion and the high media interest in the case it was unlikely that Assistant District Attorney Ford would be given "complete autonomy" by the district attorney. The court decided it would be "overstepping" the proper role of the judiciary if it were to issue an order preventing the district attorney, who is an elected official, from participating in this case and exercising the discretion that is an important part of his position. The Attorney General's sweeping argument "entirely overlooks the intrinsic characteristic of the deferential abuse of discretion test that 'the trial court is in a better position than are we to assess the likely effect' of the incident from which the charged crimes arise" and the perception of favoritism by the public that makes unbiased exercise of prosecutorial discretion substantially problematic. (*Jenan, supra*, 140 Cal.App.4th at p. 793.) We find the trial court's reasoning to be sound and supported by the record.

Therefore, we will defer to its exercise of discretion. (*Ibid.*; *Lewis, supra*, 53 Cal.App.4th at p. 1286; *Choi, supra*, 80 Cal.App.4th at p. 483.)

DISPOSITION

The recusal order is affirmed.

LEVY, Acting P.J.

WE CONCUR:

GOMES, J.

DAWSON, J.